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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-996

WILLIAM R. PERL,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The opinions of the court of appeals, not yet reported, are reproduced at Appendix A (pp. 1a-16a *infra*). No opinion was filed by the district court.

JURISDICTION

The opinions and judgment of the court of appeals were filed on September 22, 1978. A timely petition for rehear-

ing was denied on October 20, 1978 (Appendix B, p. 17 a, *infra*). On November 13, 1978, Mr. Chief Justice Burger extended petitioner's time for filing a petition for a writ of certiorari to and including December 19, 1978 (Appendix C, p. 18 a, *infra*). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge correctly took from the jury the defense of entrapment where the individual who allegedly entrapped the petitioner was not an established informer but instigated and induced petitioner's offense exclusively for the purpose of reporting the offense to law enforcement officials and did, in fact, make such a report before the offense was consummated.

2. Whether the entrapper's own admissions that he was working for the intelligence and security forces of a foreign government that wished to have the defendant prosecuted and the fact that petitioner had been the target of substantial governmental interest and surveillance over the preceding years constituted sufficient proof of government involvement to warrant submission of the entrapment defense to the jury.

STATEMENT

Following an eight-day jury trial, petitioner was convicted of wilfully attempting to damage property of foreign officials (18 U.S.C. §970(a)), unlawfully receiving a firearm from outside the State of Maryland (18 U.S.C. §922(a)(3)), and conspiracy (18 U.S.C. §371) – all in connection with an unconsummated attempt to shoot out windows in the

residences of two Second Secretaries of the Soviet Embassy.[1] At trial there was no dispute regarding most of the events that transpired. The defense turned on issues of entrapment and intent. The trial judge, however, refused all entrapment instructions and told the jury that "entrapment is not a defense in this case." Petitioner was fined $12,000, given a two-year suspended sentence, and placed on three years' supervised probation. The court of appeals reversed petitioner's conviction on the conspiracy count, but affirmed his conviction on the two substantive counts.

Petitioner is a 71-year-old retired psychologist and college professor who has been suffering from Parkinson's Disease (Tr. 1118).[2] A survivor of Nazi persecution, he has long been active in humanitarian causes, particularly those dealing with the welfare and protection of fellow Jews. He founded the Washington, D.C., chapter of the Jewish Defense League ("JDL") and, throughout the events encompassed in this lawsuit, served as its president. It was established at trial that, as the court of appeals concluded, "both he [Dr. Perl] and the Washington Chapter [of the JDL] have a reputation for non-violence" (p. 2a, *infra*).

The principal witness against Dr. Perl was Reuven Lev-tov, a former employee of the Embassy of Israel and frogman in the Israeli military. Lev-tov's past included a history of mysterious trips to Israel, a trial of failed business ventures, and a recent formal repudiation of Israeli citizenship. Lev-tov testified that he had come to feel very "bad"

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[1] Petitioner was acquitted on a fourth count charging receipt of a stolen firearm in violation of 18 U.S.C. §922(j).

[2] "Tr." refers to the pages of the trial transcript, portions of which were reprinted in the Joint Appendix filed with the court of appeals.

about acts of terrorism being perpetrated in the name of various Jewish causes and determined to "try to stop it" (Tr. 473-474). He conceived a plan to induce a leading JDL figure to join him in committing some violent act and then to deliver his accomplice to the authorities prior to actual commission of the crime.

Pursuant to this plan, sometime in 1973, Lev-tov attended a meeting of the Washington JDL at petitioner's home. He sought out Dr. Perl, introduced himself as a former Israeli Navy officer with good contacts at the Israeli Embassy (Tr. 1175), and made himself "available if any violent acts should be carried out" (Tr. 477). In Lev-tov's words, petitioner's response was, "[W]e don't do things like that here in Washington" (Tr. 477).

Petitioner and Lev-tov did not meet again until the spring of 1976. Each man claimed that the other initiated the contact. Lev-tov testified that at a meeting on April 10 Dr. Perl told him that "maybe something like that goes on in New York will start here" (Tr. 481). Lev-tov understood this to mean that the "same violent acts" that had occurred in New York would start in Washington, and he replied that he was ready (Tr. 481-482).[3] Eight days later Lev-tov testified, the two met again, and Dr. Perl mentioned that a firearm was coming from New York (Tr. 484). Lev-tov reported neither of these meetings to the authorities "[b]ecause I didn't want anybody to get involved until the actual time to do it, somebody might tail me, or foul up the whole thing" (Tr. 503).

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[3] Lev-tov's testimony differed significantly from entries in his diary, which was produced at trial and contained indicia of recent fabrication (See Tr. 642-647).

Dr. Perl testified that Lev-tov called him in late March and asked to come over. At the meeting two weeks later, Lev-tov told him he was working for "Israeli intelligence," which had learned that the Soviet Union was planning to arrest all who had registered to immigrate to Israel and to deport "many thousands of others to the East" (Tr. 1184). The Israeli government had decided, Lev-tov said, that the only thing that might prevent this mass deportation would be if American Jews brought it home very firmly to the Russians that they couid not embark on such a program without strong international repercussions.

Dr. Perl then asked what kind of activities would be involved, and Lev-tov said it would be necessary to take "final and definite actions against some individuals." Dr. Perl responded, "This is not my cup of tea, count me out." Lev-tov then reminded Dr. Perl of his experience at the hands of the Nazis and told him that "American Jews could have saved many people if they would have spoken up against the Nazi diplomats here." Lev-tov "put pressure on me," Dr. Perl testified, by reminding him that numerous members of his family had been killed by the Nazis (Tr. 1186-1188).

When Dr. Perl refused to go along with any assassination scheme, Lev-tov suggested alternative courses: He could shoot into the windows of the Russian diplomats' cars as they were driving home from the Soviet Embassy, and the JDL, through Dr. Perl, could publicize and take responsibility for the shooting. The reason that the JDL should claim responsibility, Lev-tov said, was that it was of critical importance that the Israeli government not be linked to the shooting incident. Again, however, Dr. Perl declined to become involved. He told Lev-tov: "I can't do it. I can't work on something like that and I won't" (Tr. 1189).

At that point, Dr. Perl testified, Lev-tov made another, less violent proposal: He suggested that the protest take the form of shooting out windows in the home of one of the Soviet diplomats. Again Lev-tov urged Dr. Perl to cooperate with him, telling him that (Tr. 1190):

> [Y]our relatives could be looking over your shoulder, those who were murdered, they have every right to expect from you, you try to prevent more murders and remember how you felt when you were under the Nazis and the American Jews did nothing . . . .

Dr. Perl testified that he felt "blackmailed" by this pressuring (Tr. 1188). He then yielded and agreed to take part in the scheme, with the understanding that he would handle the publicity and announce that the Jewish Defense League or the "Jewish Armed Resistance" was responsible for the shooting incident (Tr. 336-337).

On April 18 Dr. Perl gave Lev-tov the addresses of two Soviet diplomats. Lev-tov suggested that Dr. Perl supply him with a rifle. Dr. Perl expressed surprise and told Lev-tov he had understood his role was to be limited to publicity only. Lev-tov told him, however, that he could not supply the rifle because it would risk exposing the Israeli government's involvement in the incident. After further urging from Lev-tov, playing on Perl's religious and nationalistic feelings, Dr. Perl agreed to try to provide a rifle (Tr. 1197).

At subsequent meetings Dr. Perl supplied Lev-tov with a .22 caliber rifle and ammunition, both received from JDL sources in New York. Lev-tov reported that Israeli intelligence had verified the addresses of the Russian diplomats. The afternoon of May 23 was set for the shooting (Tr. 487, 495, 506).

On May 19 Lev-tov visited the Israeli Embassy and reported to an official there that he had been asked to shoot out the windows. The embassy official told him "to contact the authorities" (Tr. 508). Lev-tov did not immediately do so, but he received a visit the following afternoon from two FBI agents, who had been alerted by the Israeli embassy. Lev-tov gave them the rifle and bullets as well as an account of his meetings with Dr. Perl. It was agreed that Lev-tov would continue with the plan. He was given another gun and blanks and was instructed to wear a body recorder at all subsequent meetings with Perl (Tr. 514-516, 526, 700).

On May 23 Lev-tov acted out the planned shooting under the surveillance of the FBI and thereafter called Dr. Perl as previously arranged. The FBI did not arrest Dr. Perl immediately. Rather, wearing a body recorder, Lev-tov was sent to Dr. Perl with a spurious federal grand jury subpoena to see whether Dr. Perl would attempt to suborn perjury on the part of Lev-tov (Tr. 424-425). Dr. Perl did not. He was then indicted and arrested.

Lev-tov denied that he had communicated with the FBI or with any federal agency before his meeting with Dr. Perl in 1973 or the first meeting in 1976 (Tr. 550). FBI agents who testified at trial similarly denied that Lev-tov had been a government agent or informer before May 20, 1976, when he was visited by the FBI (Tr. 264, 267-268, 275-276, 350-352, 428). Lev-tov admitted, however, that he had told an acquaintance that he was "working for Israeli intelligence" (Tr. 156-158), and another witness testified that Lev-tov had told him that he had participated in these events at the request of "the Israeli Government" (Tr. 241-242). In addition, Lev-tov told petitioner's counsel less than two days before trial began that he had been called

by "Israeli security" in anticipation of his testimony at trial (Tr. 1215). There was also voluminous evidence that the FBI had surveilled Dr. Perl and written substantial and detailed reports concerning him for many years before the events at issue (Tr. 282, 398-402). And in April 1976, when Lev-tov first met with Dr. Perl, a federal grand jury subpoena was served upon the telephone company for records of Dr. Perl's toll calls (Tr. 1394-1395).

At trial and again on appeal petitioner argued on two grounds his entitlement to an entrapment instruction. *First*, he argued that no showing of government involvement in the scheme to entrap need be made if there otherwise exists evidence that defendant was "induced to commit a crime he had no predisposition to commit solely and exclusively in order to have him handed over to authorities." *Second*, he argued that even if government involvement need be shown, Dr. Perl had presented evidence (1) that Lev-tov was an agent of the Israeli government, which intended to turn Dr. Perl over to American law enforcement authorities and (2) to permit an inference that Lev-tov had been working in contact with federal agents prior to the time he reported Dr. Perl to the Israeli embassy. Appropriate instructions covering these legal theories were offered to the trial judge. The judge rejected these instructions and told the jury that entrapment was not an available defense.

In affirming the trial court's refusal to deliver any of the petitioner's proposed instructions, the court of appeals did not question the evidence that Dr. Perl had commited the offenses only because of the inducements of Lev-tov, whose intention throughout was to trap Dr. Perl and turn

him over to the authorities. Rather, it held[4] that under federal law "'[e]ntrapment cannot result from inducements of a private citizen but must be the product of conduct of governmental agents'" (p. 5 a, *infra*). The court also held that entrapment by an agent of a foreign government could never constitute a legal defense (p. 7a, n. 3, *infra*), and it ruled that petitioner had failed to show sufficient federal involvement in Lev-tov's plan to warrant a jury instruction on that theory.[5] In reaching these results, the court of appeals explained its rationale as follows (p. 7a, n. 3, *infra*):

> As we view it, the principal purpose of the entrapment defense as it has developed in the federal courts is to deter official misconduct in the investigation of criminal activity.

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals rejecting petitioner's entrapment defense conflicts squarely with the rationale

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[4] The court quoted from *United States v. Garcia*, 546 F.2d 613, 615 (5th Cir.), *cert. denied*, 430 U.S. 958 (1977).

[5] In place of the requested entrapment instructions, and over petitioner's strong objection, the Court delivered a lengthy instruction to the effect that petitioner could not properly rely on "higher law" in his defense (Transcript of Nov. 24, 1976, pp. 18-19). This instruction was taken, almost verbatim, from the same trial judge's instruction in the prosecution of Rev. Phillip Berrigan. *United States v. Berrigan*, 283 F.Supp. 336 (D. Md. 1968), *aff'd sub nom. United States v. Eberhardt*, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970). Petitioner had, at all times, disavowed reliance on any such defense and introduced no supporting testimony. Indeed it was of critical importance to petitioner's case to impress upon the jury that petitioner did *not* act from moral conviction, but only after being induced and prevailed upon by Lev-tov.

for the entrapment defense explained recently and authoritatively by this Court in *Hampton v. United States,* 425 U.S. 484 (1976), and in *United States v. Russell,* 411 U.S. 423 (1973). The "principal purpose of the entrapment defense" is not, as the court of appeals believed, "to deter official misconduct in the investigation of criminal activity" (p. 7a, n. 3, *infra*), but to prevent the criminal prosecution of those who lack "the intent or predisposition . . . to commit the crime." *United States v. Russell,* 411 U.S. at 429. In both *Russell* and *Hampton* this Court emphasized the distinction between a rule of deterrence, designed to prevent governmental misconduct, and a rule of fairness to individuals who are not, in the absence of entrapment, predisposed to commit criminal offenses. In its *Hampton* opinion (425 U.S. at 488) this Court approved the rule established in *Sorrells v. United States,* 287 U.S. 435, 442 (1932), under which the availability of the entrapment defense turns on whether the entrapper's activity was designed to "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission."

Application of the proper rationale of entrapment – as enunciated in *Russell* and *Hampton* – requires reversal of petitioner's conviction. If the jury believed Dr. Perl – whose testimony was amply corroborated by his established reputation for non-violence and by many internal contradictions in the testimony of Lev-tov – it would have had to find that this was an instance in which the offense was never to be carried out but had been created by Lev-tov solely as a trap to ensnare Dr. Perl and hand him over to the authorities – precisely "the *manufacturing* of crime" decried in many of this Court's entrapment opinions. *E.g., Lopez v. United States,* 373 U.S. 427, 434 (1963) (emphasis in original).

2. No federal appellate decision has yet, to our knowledge, recognized the defense of entrapment by a private citizen who was not previously a government informer but whose conduct was motivated entirely by law enforcement objectives.[6] In the absence of any indication to this effect from this Court, and in view of the emphasis, until recently, of the element of government misconduct in the law of entrapment, it is not surprising that there has not been such a ruling from a lower court. But at least four States have recognized such a defense as a matter of local law. In *People v. Moran,* 1 Cal. 3d 755, 761, 83 Cal. Rptr. 411, 414, 463 P.2d 763, 766 (1970), the California Supreme Court, *en banc,* held that "if the crime was suggested by another person, whether or not a law enforcement officer, for the purpose of entrapment, the defendant is not crimi-

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[6] *Sherman v. United States,* 356 U.S. 369 (1958), was a case in which there was minimal government involvement in the particular offense committed by the accused. The defendant was entrapped by one Kalchinian, who was neither a law enforcement officer nor working for or with the acquiescence of law enforcement officers at the time he induced the defendant to commit the charged offenses. The only connection between Kalchinian and law enforcement authorities was that he had previously served as an informer and that he induced the defendant to commit an offense with the intention of informing on him as soon as the defendant violated the law. Despite the fact that the government knew nothing of Kalchinian's relations with the defendant until after the crime was committed, the Court held the entrapment defense available. Indeed, it found the defendant to have established entrapment as a matter of law.

Unlike Kalchinian, Lev-tov had never previously served as a government informer. But under this Court's recent explanations of the basis for the entrapment defense, this difference is insignificant. Whether the instigator has ever talked to the government before on a different case is immaterial from the vantage point of the defendant.

nally liable." The Oklahoma Criminal Court of Appeals ruled in *Beasley v. State*, 289 P.2d 249, 254 (Okla. Crim. App. 1955), that entrapment by private individuals would give rise to a defense if the private individuals lured "an otherwise innocent person" into the commission of an offense and if "officers, although not necessarily parties to the initial proceedings, . . . [were] fully informed of the purported commission of the criminal act before it was committed." Both these standards are met, of course, on the facts of this case. See also *People v. Lewis*, 285 Ill. App. 171, 1 N.E. 2d 696, *aff'd*, 365 Ill. 156, 6 N.E. 2d 175 (1936); *Koscak v. State*, 160 Wis. 255, 152 N.W. 181 (1915); 22 C.J.S. *Criminal Law* §45(2) (1961); 21 Am. Jur. 2d *Criminal Law* §143 (1965).

3. Even under the more traditional view of entrapment, which requires proof of official involvement in the efforts of the entrapper, the evidence here was sufficient to submit the defense to the jury. The substantial evidence that Lev-tov was working for a foreign government which wished to see Dr. Perl apprehended was a basis for the entrapment defense. Federal courts have uniformly held that where State officers induced an offense, entrapment is available as a defense to a federal prosecution. *See, e.g., Henderson v. United States*, 237 F.2d 169, 176 (5th Cir. 1956); *Billingsley v. United States*, 274 F. 86 (6th Cir.), *cert. denied*, 257 U.S. 656 (1921). This is true even if the federal officers were unaware of the activities of the State agents at the time the defendant was induced to commit the crime. The State agent, acting for law-enforcement purposes is the equivalent of federal law-enforcement personnel since the target of his efforts is ultimately turned over to federal officers. See Note, *Entrapment*, 73 Harv. L. Rev. 1333, 1340-43 (1960); Note, 70 Harv. L. Rev.

1302, 1306 (1957); Working Papers of the National Commission on Reform of Federal Criminal Laws 321-22 (1970).

The same analysis applies to agents of foreign governments working in this country who act with the intention of having an American citizen convicted of a federal offense. Like State officers, they become a *de facto* part of the federal law-enforcement machinery. There was evidence at trial from which the jury could have concluded that Lev-tov was acting for Israeli intelligence or other Israeli government offices at the time he induced Dr. Perl to commit the offenses charged. Hence, it was error to refuse the entrapment instruction.

4. Moreover, the court of appeals applied an erroneous standard in ruling that, insofar as involvement by the federal government was concerned, petitioner had not met his burden on the issue of entrapment. The court of appeals recognized that under *Sherman* the entrapment defense is available "even where the government has neither prior knowledge of nor direct involvement in the scheme to entrap." But it held that "*direct proof* of prior dealings between government and entrapper is a prerequisite to raising a *Sherman-type* entrapment defense" (p. 9a, n.5, *infra*).

The evidence of the federal government's prior involvement in Lev-tov's efforts was circumstantial. There was evidence that at the time Lev-tov first met Dr. Perl in 1976, the FBI sought and secured Dr. Perl's telephone records by a grand jury subpoena. There was also voluminous evidence that the FBI had been surveilling Dr. Perl and had been highly interested in all his activities well before that time. Although Lev-tov denied any contract with the FBI, the jury should have been permitted to evalu-

ate the credibility of that denial against the circumstantial proof supporting the opposite inference. The court of appeals erroneously held that only direct proof of government involvement could justify submitting the issue to the jury.

This limitation as to the *type* of proof required of a defendant in an entrapment case finds no support in federal law. To the contrary, the cases hold that if there is "any evidence" in the record that the defendant has been induced into committing the offense, the issue of entrapment is for the jury. This is so "however incredible it might appear" and "however unreasonable the judge would consider a verdict in favor of defendant to be." *United States v. Watson*, 489 F.2d 504, 506 (3d Cir. 1973); *Notaro v. United States*, 363 F.2d 169, 172-74 & n.6 (9th Cir. 1966) (quoting *Lufty v. United States*, 198 F.2d 760, 762 (9th Cir. 1952)); *United States v. Riley*, 363 F.2d 955, 959 (2d Cir. 1966). The court of appeals did not find that petitioner had submitted no evidence. Indeed it stated (p. 9a, *infra*):

> As we view the record, defendant did establish some government interest in the activities of Dr. Perl. It appears that the FBI had maintained a file on Dr. Perl for some years and that, in April 1976, at the same time Dr. Perl and Lev-tov were formulating their plans, a subpoena was issued to obtain Dr. Perl's telephone records.

From this and other evidence in the record the jury could have inferred that Lev-tov was working in cooperation with federal agents prior to his April 1976 meetings with Dr. Perl. The instruction tendered by the defense on this theory should have been given, and the jury should not have been told, in the unequivocal terms used, that "entrapment is not a defense in this case."

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 77-1416

United States of America,

Appellee,

v.

William R. Perl,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Chief Judge.

Argued July 20, 1978 Decided September 22, 1978

Before WINTER, Circuit Judge, FIELD, Senior Circuit Judge, and HALL, Circuit Judge.

Nathan Lewin (Miller, Cassidy, Larroca & Lewin on brief) for Appellant; Richard D. Bennett, Assistant United States Attonrey (Russell T. Baker, Jr., United States Attorney, on brief) for Appellee.

WINTER, Circuit Judge:

William R. Perl was convicted of willfully attempting to damage property utilized by foreign officials in violation of 18 U.S.C. § 970, of unlawfully receiving a firearm purchased outside the State of Maryland in violation of 18 U.S.C. § 922(a)(3), and of conspiring with unknown persons to commit these

crimes in violation of 18 U.S.C. § 371. He was fined $12,000, given a two-year suspended sentence, and placed on three years' supervised probation. On appeal he urges a number of grounds of reversal, principally that the district court erroneously declined to give an entrapment instruction, that it erroneously instructed the jury on a defense not asserted at trial, and that it prejudicially confused the jury by its instructions on the conspiracy count. We agree that there was reversible error in the conspiracy conviction. The initial charge on this count was erroneous and the district court's attempt to cure the error was ineffective and likely left the jury in a state of confusion prejudicial to defendant. We therefore reverse defendant's conviction on the conspiracy count and award him a new trial. As to defendant's other contentions, however, we find no error and therefore affirm his conviction on both substantive counts.

I.

The defendant, Dr. William R. Perl, has long been active in Jewish affairs, both in Europe and in this country, and, as a survivor of the Nazi persecutions, he has been particularly concerned about the welfare of Jews living in the Soviet Union. Among the organizations in which he has been active is the Jewish Defense League (JDL). He was a founder of the Washington, D.C., chapter of that organization and, at the time that the events material to the instant case commenced, was serving as its president. Both he and the Washington Chapter have a reputation for non-violence.

Sometime in 1973, an Israeli expatriate named Reuven Lev-tov attended a meeting of the Washington Chapter of the JDL held at the home of Dr. Perl. By all accounts, Reuven Lev-tov was and is a shadowy and intriguing figure. After ten years in the Israeli Navy, where he was a member of its elite "special forces," Lev-tov joined the Israeli foreign

service and was assigned duty at the Israeli embassy in Washington as chauffeur and apparent bodyguard to the ambassador. In 1965, he married an American citizen and shortly thereafter was dismissed from service at the Israeli Embassy. In 1968, he returned to Israel for a three-year period before settling permanently in this country in 1971. He subsequently became a specialist in electrolysis, maintaining an office in Washington, D.C. Recently he renounced his Israeli citizenship, after having become an American citizen some ten years earlier.

At trial, Lev-tov testified that by 1973 he had come to feel bad about acts of terrorism perpetrated in the name of various Jewish causes and became determined to take some action to combat its spread. To this end, he conceived a plan to induce a leading Jewish figure to join him in committing some violent act. Before the commission of the act, however, it was Lev-tov's intention to turn his accomplice over to the authorities. He apparently chose as his victim Dr. Perl and, with this plan in mind, attended the 1973 JDL meeting at Dr. Perl's home.

At the conclusion of this meeting, Lev-tov managed to engage Dr. Perl in private conversation. Lev-tov made known his own concern for the plight of Soviet Jews and his availability to help carry out any act of violence suitable to Dr. Perl. Dr. Perl gave Lev-tov no encouragement, stating, according to Lev-tov, that "we don't do things like that here in Washington."

Nothing more occurred until the spring of 1976, by which time Dr. Perl had developed Parkinson's Disease and was under constant medication. On April 10, 1976, Dr. Perl and Lev-tov met at a motel in the Maryland suburbs and agreed that an appropriate form of protest would be to shoot out the windows of the apartments of two Soviet of-

ficials living in Prince George's County, Maryland. It was agreed that Lev-tov would do the actual shooting and that Dr. Perl would publicize the event and announce that it was the responsibility of the JDL. At a subsequent meeting, it was agreed that Dr. Perl would also supply the weapon and ammunition. Dr. Perl then took steps to obtain a rifle from JDL sources in New York. He was successful in these efforts and, on May 6, turned the weapon over to Lev-tov, and, on May 7, the ammunition to fire it. May 23, a Sunday, was fixed as the date for the shooting.

On May 19, Lev-tov went to the Israeli Embassy, there telling an official that he had been asked to shoot out the windows of two apartments belonging to Soviet officials. He was advised to contact "the authorities." However, before Lev-tov could make such contact he was approached at his office by two FBI agents who had been alerted to the situation by an attache at the Israeli Embassy. Lev-tov made a detailed statement to the agents concerning his association with Dr. Perl, and it was agreed that Lev-tov would continue with the plan. He was instructed to wear a body recorder at his next meeting with Dr. Perl, which was to take place on May 22. The recording was later introduced as evidence against Dr. Perl at trial. On May 23, the planned shooting was carried out with a weapon and blanks provided by the FBI.

On June 29, 1976, Dr. Perl was indicted for his role in the incident. Trial was held in November, 1976. Dr. Perl was convicted on three of the four counts on which he was charged, and this appeal followed.

II.

Dr. Perl freely admits that he participated in the plan to shoot out the windows of the Soviet officials and that he

provided Lev-tov a weapon for this purpose. At trial, his only defense was that he was entrapped by Lev-tov and that, therefore, no criminal liability should attach. In keeping with this theory of the case, the defense proposed three alternative entrapment instructions to the district court. The trial court rejected all three, instructing the jury flatly that "entrapment is not a defense in this case."

On appeal, defendant makes two separate arguments with respect to the entrapment defense. *First*, he contends that government involvement in the scheme to entrap should not be treated as a necessary element in the federal defense of entrapment and urges us to adopt this as the law of this circuit. *Second*, defendant argues that even if some government involvement is required, there exists sufficient evidence of such involvement in the instant case to entitle him to jury consideration of the defense. We do not agree with either contention.

The case are legion which either hold directly or state as dictum that "[e]ntrapment cannot result from the inducements of a private citizen but must be the product of conduct by governmental agents." United States v. Garcia, 546 F.2d 613, 615 (5 Cir.), *cert. denied*, 430 U.S. 958 (1977).[1] On numerous occasions, this court, without ever directly so holding, has clearly expressed its view that federal law does not recognize the defense of private entrapment. United States

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[1] *See, e.g.*, United States v. McClain, 531 F.2d 431, 437 (9 Cir.), *cert. denied*, 429 U.S. 835 (1976); United States v. Maddox, 492 F.2d 104, 106 (5 Cir.), *cert. denied*, 419 U.S. 851 (1974); United States v. DeAlesandro, 361 F.2d 694, 698-99 (2 Cir.), *cert. denied*, 385 U.S. 842 (1966); Johnson v. United States, 317 F.2d 127, 128 (D.C. Cir. 1963); United States v. Romano, 278 F.2d 202, 204 (2 Cir. 1960); Polski v. United States, 33 F.2d 686, 697 (8 Cir.), *cert denied*, 280 U.S. 591 (1929).

v. Tharpe, 443 F.2d 12, 13 (4 Cir.), *cert. denied,* 404 U.S. 866 (1971); United States v. DeVore, 423 F.2d 1069, 1071 (4 Cir. 1970), *cert. denied,* 402 U.S. 950 (1971); United States v. Comi, 336 F.2d 856, 860 (4 Cir. 1964), *cert. denied,* 379 U.S. 992 (1965); United States v. Sizer, 292 F.2d 596, 599 (4 Cir. 1961); Crisp v. United States, 262 F.2d 68, 69 (4 Cir. 1958).

Despite this vast array of precedent, defendant urges us to recognize a private-entrapment defense. Under defendant's theory, no showing of government involvement in the scheme to entrap need be made if there otherwise exists evidence that defendant was "induced to commit a crime he had no predisposition to commit solely and exclusively in order to have him handed over to the authorities." Defendant's Proposed Instruction No. 23. While we recognize that at least two states have adopted the defense of private entrapment,[2] we believe that federal courts must require some showing of government involvement in the alleged scheme to entrap before the defense is recognized.

Entrapment, as it exists in federal law, is a statutory defense. "It is rooted . . . in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them *by the Government.*" United States v. Russell, 411 U.S. 423, 435 (1973) (emphasis added). This view of legislative intent has remained firm since the Supreme Court first recognized entrapment as a federal defense in Sorrells v. United States, 287 U.S. 435 (1932). There, Chief Justice Hughes wrote:

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[2] *See* People v. Moran, 463 P.2d 763, 766 n.4 (Calif. 1970); Beasley v. State, 282 P.2d 249, 254 (Okla. Crim. 1966).

> We are unable to conclude that it was the intention of the Congress in enacting [a criminal] statute that its processes of detection and enforcement should be abused by the instigation *by government officials* of an act on the part of the persons otherwise innocent in order to lure them to its commission and to punish them.

287 U.S. at 448. Similarly, in Lopez v. United States, 373 U.S. 427, 434 (1963), the Court observed that "[t]he conduct with which the defense of entrapment is concerned is the manufacturing of crime *by law enforcement officials and their agents.*" (Emphasis added and deleted.)

In view of this longstanding and authoritative interpetation of legislative intent, we hold that a defendant, in order to assert the defense of entrapment in a federal prosecution, must produce evidence of government involvement in the scheme to entrap. We therefore affirm the district court's rejection of defendant's private entrapment instruction.[3]

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[3] By government involvement, we mean involvement of federal, state or local law enforcement officials or their agents. *See* Henderson v. United States, 237 F.2d 169 176 (5 Cir. 1956). We do not mean involvement by agents of a foreign government. One of defendant's three proposed entrapment instructions provided that the "defense of entrapment is open to the defendant . . . if [Lev-tov] was at [the time of entrapment] working on behalf of the Israeli government, if the Israeli government intended to turn Dr. Perl over to American law enforcement authorities." Defendant's Proposed Instruction No. 26. As we view it, the principal purpose of the entrapment defense as it has developed in the federal courts is to deter official misconduct in the investigation of criminal activity. As we have elsewhere said: "The defense of entrapment rests on the premise that the purpose of *law enforcement* is the prevention, not the manufacture of crime." United States v. DeVore, *supra,* 423 F.2d at 1070. *See also* United States v. Sizer, *supra,* 229 F.2d

Alternatively, defendant argues that even if some showing of government involvement in the entrapment plan is required, there exists sufficient evidence of such involvement in the instant case to entitle defendant to a standard entrapment instruction.[4] Stated otherwise, defendant argues that the district court erred when it decided as a matter of law that even the traditional entrapment defense was unavailable to defendant. We disagree.

It is well established that entrapment is an affirmative defense and that the "initial burden [is on defendant] to go forward with some evidence, more than a scintilla, that [the government or its] agents induced him to commit the offense." United States v. Harper, 505 F.2d 924, 926 (5 Cir. 1974). "If a defendant fails to carry the burden on the issue of entrapment forward, he is not entitled to submission of the issue to a jury." United States v. Groessel, 440 F.2d 602, 606 (5 Cir.), *cert. denied*, 403 U.S. 933 (1971). *Accord*, Lopez v. United States, *supra*, 373 U.S. at 435; United States v. DeVore, *supra*, 423 F.2d at 1071. The duty of determining whether or not defendant has met this initial burden is that of the district judge. United States v. Teeslink, 421 F.2d 768, 771 (9 Cir. 1970).

In the instant case, the district court determined that defendant failed to carry his initial burden of showing some

at 599. This purpose would no more be served by extending the doctrine to include entrapment by foreign agents than it would be by extending the defense to include entrapment by private citizens. The district court, in our view, correctly rejected defendant's proposed instruction on foreign entrapment.

[4] Defendant's Proposed Instruction No. 27 would have instructed the jury to acquit "if you have a reasonable doubt whether Reuven Lev-tov was acting on behalf of any agency of the United States Government, and whether he prevailed upon Dr. Perl to commit offenses he would not otherwise have committed. . . ."

government involvement in Lev-tov's plan to entrap Dr. Perl. We cannot say that it erred in this determination. As we view the record, defendant did establish some government interest in the activities of Dr. Perl. It appears that the FBI had maintained a file on Dr. Perl for some years and that, in April 1976, at the same time Dr. Perl and Lev-tov were formulating their plans, a subpoena was issued to obtain Dr. Perl's telephone records. We do not think, however, that such evidence of government interest in Dr. Perl could reasonably support an inference of government involvement in Lev-tov's entrapment scheme. Without even a scintilla of evidence to back up his speculations as to government involvement, defendant was simply not entitled to jury consideration of his entrapment defense.[5] *Cf.* United States v. DeVore, *supra* (defendant held not entitled to jury instruction on entrapment where he produced evidence of government solicitation but failed to produce evidence of government inducement sufficient to create a doubt that defendant was otherwise predisposed to commit the crime); United States v. Comi, *supra* (defendant held not entitled to jury instruction on entrapment where there existed no

[5] Defendant relies heavily on Sherman v. United States, 356 U.S. 369 (1958), for the proposition the government involvement need be neither great nor direct in order for the entrapment defense to be available. While we agree that *Sherman* allows an entrapment defense even where the government has neither prior knowledge of nor direct involvement in the scheme to entrap, it still requires a showing that the government and the entrapper have an established relationship such that the government is estopped from denying responsibility for the entrapment. In the instant case, defendant produced not a shred of evidence linking Lev-tov to the United States government. Some direct proof of prior dealings between government and entrapper is a prerequisite to raising a *Sherman*-type entrapment defense. *See also* United States v. Comi, *supra*, 336 F.2d at 860-61.

evidence that any government agent initiated or in any way induced the defendant to commit the crime).

III.

Defendant next contends that the district court erred in giving a so-called "Berrigan" instruction. *See* United States v. Berrigan, 283 F.S. 336 (D. Md. 1968), *aff'd sub. nom.* United States v. Eberhardt, 417 F.2d 1009 (4 Cir. 1969), *cert. denied*, 397 U.S. 909 (1970). In essence, this portion of the charge instructed the jury that moral convictions or adherence to a "higher law" constitute no legal justification for criminal activity.[6] Defendant asserts that it was improper for the district court to give this instruction in light of de-

[6] In full, the district court's "Berrigan" instruction, which had been requested by the government, was as follows:

> Intent and motive should never be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which the act is done.
>
> Personal advancement, financial gain, political reason, religiious beliefs, moral convictions or some adherence to a higher law even of nations are well recognized motives for human conduct. These motives may prompt one person to voluntary acts of good and another to voluntary acts of crime.
>
> The law does not recognize political, religious, moral convictions or some higher law as justification for the commission of a crime no matter how good that motive may be. The reason this is so is that such personal motives or firm beliefs, if you will, would enable the individual holder to select the law which he would obey according to those beliefs. These personal convictions could prompt him to steal, rob, commit assaults upon those holding contrary views and even to kill, under certain circumstances.

fendant's repeated disclaimers throughout the trial of any reliance on a "higher-law" defense. We disagree.

It is, of course, well established that the introduction of an extraneous and irrelevant legal issue into the case by way of the district court's charge to the jury may so confuse or mislead the jury that a new trial is warranted. "It is not the function of the trial judge to instruct the jury on abstract principles of law which have no bearing on the case. Extraneous *law* may be quite as prejudicial as extraneous *facts*. Verdicts should be based only on the evidence in the case and the pertinent law as applied to that evidence." United States v. Hill, 417 F.2d 279, 281 (5 Cir. 1969). *See also* Michaud v. United States, 350 F.2d 131 (10 Cir. 1965); Morris v. United States, 326 F.2d 192 (9 Cir. 1963); United States v. Leggett, 312 F.2d 566 (4 Cir. 1962).

We are not persuaded, however, that the court's "Berrigan" charge was extraneous to the instant case. It is true that

Or, to put it another way, as Mr. Justice Goldberg said in the case of Cox v. Louisiana:

> The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost.

And he went on further to say in that case:

> We also reaffirm the repeated decisions of this Court, meaning the Supreme Court of the United States, that there is no place for violence in a democratic society dedicated to liberty under law, and that the right of a peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and a place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations.

defendant from the outset disclaimed any reliance upon a "higher-law" defense. Nonetheless, we agree with the government that implicit in both the testimony of defense witnesses and defendant's closing argument was the suggestion that Perl's deep concern for the plight of Soviet Jewry in some way explained his criminal activities. The district court, which was in a position to assess firsthand the tenor of the trial, may properly have concluded that the jury, however attentive, could well confuse logical explanation with legal justification and that the best way to prevent such confusion was to caution the jury against being swayed by Dr. Perl's motives. From the record before us, we cannot say that the district court acted unreasonably in this regard.

IV.

In Count One of the indictment, Dr. Perl was charged under 18 U.S.C. § 371 with conspiring with unknown persons (presumably his JDL "sources" in New York) to obtain illegally a firearm for the purpose of damaging property occupied by foreign officials. Because Lev-tov, throughout his association with Dr. Pearl, lacked any intention of committing a criminal act, he was not charged as a co-conspirator.

Defendant was naturally concerned that the jury would improperly use evidence of his dealings with Lev-tov as proof of the conspiracy with which he was charged. Consequently, defendant asked for the following cautionary instruction:

> A conspiracy is an agreement between two or more persons to engage in conduct that violates the law. Dr. Perl is charged in this case with being a conspirator in an illegal scheme in which

> various persons unknown to the grand jury were allegedly other participants. The indictment does not charge that Dr. Perl conspired with Reuven Lev-tov, and you may not regard any apparent agreement between Dr. Perl and Mr. Lev-tov as the conspiracy charged in Count One of the indictment. To find Dr. Perl guilty of the charge in Count One of the indictment you must find beyond a reasonable doubt that Dr. Perl was a member of a conspiracy composed of persons other than Reuven Lev-tov.

Despite the manifest correctness of this statement of law,[7] the district court declined to give the requested instruction. Instead, it told the jury that "the First Count has to do with conspiracy, that's an agreement between – charged between Reuven Lev-tov and the Defendant and other persons unknown." After defense counsel objected to the inclusion of Lev-tov in the conspiracy instruction, the district court attempted to cure the error as follows:

> Members of the jury, it has been called to my attention that I said Reuven Lev-tov was a co-conspirator. He was not so charged in the indictment. He was part of the agreement, but not of the conspiracy. The conspiracy is with people unknown at the time the indictment was – right?

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[7] *See, e.g.*, Johnson v. Sheriff, 532 P.2d 1037, 1038 (Nev. 1975); People v. Atley, 220 N.W.2d 565, 572 (Mich. 1974); State v. Norton, 170 S.E.2d 466, 470 (N.C. 1969), *cert. denied*, 398 U.S. 959 (1970); Delaney v. State, 51 S.W.2d 485 (Tenn. 1932); *see also* 15A C.J.S. Conspiracy § 37 at 731; Perkins on Criminal Law 622 (2d ed. 1969); Developments-Criminal Conspiracy, 72 Harv. L. Rev. 920, 926 (1959).

Defense counsel again objected, arguing that the distinction between being a party to an agreement and being a party to a conspiracy was confusing to the jury and that a more precise instruction was required. The district court, however, agreed with the government that it was simply a matter of "semantics" and concluded to "let it stand the way it is."

Because we think that the original instruction on conspiracy was erroneous and that defendant was entitled to a clear and unequivocal correction of the error which he failed to receive, we reverse his conviction on the conspiracy count. This was not the typical conspiracy case. The principal dealings occurred between Dr. Perl and Lev-tov, and most of the evidence adduced at trial was material only to them. The unknown persons charged as co-conspirators were at best minor players at the fringes of the major plot. Because the conspiracy charged in this case was not central to the drama being played out to the jury, the jury should have been carefully admonished to exclude from its consideration of conspiracy all evidence of any agreement between defendant and Lev-tov. Such an instruction was not given. In the absence of such an instruction, there was on the facts a substantial likelihood that the defendant was prejudiced; because, despite a conscientious attempt to follow the district court's instructions, the jury may well have convicted the defendant for conspiring with Lev-tov. We, therefore, reverse his conviction on Count One of the indictment and direct that he be awarded a new trial on this charge.

V.

We find no merit in either of defendant's remaining assignments of error. Even if, as defendant asserts, the district court erred in excluding certain expert testimony which

the court felt came within the notice requirement of F.R. Crim. P. 12.2(b),[8] we think that defendant suffered no prejudice as a result of this action. Since the excluded testimony bore relevance only to the entrapment defense, which, as we have already discussed, was properly withheld from jury consideration, any error in excluding such testimony was necessarily harmless. F.R. Crim. P. 52(a).

Likewise, we see no prejudice to defendant in the clerk's entry into the jury room to inquire whether the jury would continue its deliberations into the evening hours or instead would adjourn to the next working day. Certainly none of the cases cited by defendant suggest that such a minor and benign intrusion into jury privacy warrants a reversal of a verdict otherwise properly reached.

AFFIRMED IN PART;
REVERSED IN PART;
NEW TRIAL AWARDED.

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[8] Rule 12.2(b) provides that "[i]f a defendant intends to introduce expert testimony relating to a mental disease, defect or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intent. . . ." Subdivision (d) authorizes the court to exclude such testimony "[i]f there is a failure to give notice when required by subdivision (b) . . . ." Defendant concedes that no notice was given but argues that the proffered testimony, which spoke to Dr. Perl's increased susceptibility to suggestion as a result of the medication he was taking, lay outside the scope of Rule 12.2(b). We have no need to reach this question.

HALL, CIRCUIT JUDGE, CONCURRING IN PART AND DISSENTING IN PART:

I concur in the statement of facts and in Parts II, III and V of the opinion, but must respectfully dissent from Part IV in which the majority holds that the curative instruction on the issue of conspiracy was so confusing as to constitute reversible error.

The instruction, while inartful, stated that Reuven Lev-tov was not part of the conspiracy charged, but rather that the conspiracy was with persons unknown. On the basis of this instruction, I fail to see how the jury could have convicted Dr. Pearl for conspiring with Lev-tov. Therefore, I would affirm the verdict of guilty on the charge of conspiracy.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1416

United States of America,

Appellee,

versus

William R. Perl,

Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Winter for a panel consisting of Judge Winter, Judge Field, and Judge Hall.

For the Court,

/s/ William K. Slate, II
Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-443

WILLIAM R. PERL,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 19th, 1978.

/s/ Warren E. Burger
Chief Justice of the
United States.

Dated this 13th
day of November, 1978